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Narenthra Rao a/l TG Somanatha Rao v Malayan Banking Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 16–2–02 OF 2013
LEE SWEE SENG J
6 MAY 2014

Contract — Contract of employment — Claim for salary — Claim for salary deducted by employer for days when appellant attended to trade union activities — Whether appellant entitled to paid leave to attend to trade union activities — Whether employer's previous acts of granting paid leave now estopped employer from denying paid leave — Whether employer acting mala fide in denying paid leave — Industrial Relations Act 1967 s 6

Labour Law — Employment — Contract of employment — Claim for salary — Claim for salary deducted by employer for days when appellant attended to trade union activities — Whether appellant entitled to paid leave to attend to trade union activities — Whether employer's previous acts of granting paid leave now estopped employer from denying paid leave — Whether employer acting mala fide in denying paid leave — Industrial Relations Act 1967 s 6

The appellant was the Honorary Treasurer of the National Union of Banking Employees ('NUBE') for its Ipoh Branch. He was also an employee of the respondent, having worked as a clerk for the respondent bank for 30 years. Under the scheme of trade union protection and promotion, both under the Industrial Relations Act 1967 ('the IRA'), the Employment Act 1955 and the relevant collective agreement between NUBE and Malayan Commercial Banks' Association ('MCBA'), the appellant was accustomed to applying for paid leave to attend to his trade union activities. No question was asked as to whether the leave was required to attend to his trade union activities in relation to industrial matters concerning his employer. Neither was he required to set out the specific activities of the trade union that he had to attend. That had been the position from 2005 to February 2011. However, when the appellant applied on 2 March 2011 for his usual paid leave on ground of his need to carry out his trade union duties, the respondent refused to grant the leave on the grounds that the appellant had failed to state the reasons for such a trade union leave. His attention was drawn to article 7(1) of the memorandum of agreement between NUBE and the MCBA ('article 7(1)') which stated that the paid leave applied for must be for attending to industrial matters concerning his employer. The respondent however granted the appellant unpaid leave. The appellant suffered a loss of RM3,993.87 between March 2011 to September 2011 for the number of days of unpaid leave taken. That amount had been deducted from his salaries. The appellant brought a claim in the Labour Court

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for the said amount claiming that his salaries had been unlawfully deducted. The Labour Court dismissed his claim and hence this appeal. The appellant contended that he had a legitimate expectation to continue receiving paid leave to carry out his trade union duties and that the respondent acted mala fide when it refused to grant him paid trade union leave.

Held, allowing the appeal in part with no order as to costs:

(1) The respondent had given notice by its response dated 15 March 2011 as to its intention of abiding by the requirements of article 7(1) where paid leave was concerned. This was a communication by the respondent to the appellant of its rational ground for withdrawing what had hitherto been granted without any question raised. The appellant had every opportunity to reply but there was none exhibited. Instead, the appellant through NUBE continued to apply for trade unions leave after the notification of 15 March 2011 in the same standard format as before without stating the reasons for the leave other than 'for his trade union activities'. Hence, the appellant could not rely on legitimate expectation when there was a clear term in article 7(1) that the parties had agreed on. Where there was an express contractual term, the appellant could not rely on legitimate expectation to depart from or denude the term (see paras 22–23).

(2) Article 7(1) was a reproduction of the statutory protection in s 6 of the IRA, given to both the workman intending to carry out his duties or to exercise his rights as an officer of a trade union as well as his employer. Even if there had been no article 7(1), s 6 of the IRA would apply as it is a statutory provision enacted by Parliament unless the parties agree to a more favourable term with respect to the workman. Generally there can be no estoppel where statute is concerned (see paras 25–26).

(3) The appellant had not adduced any evidence to prove his allegation that the respondent had stopped giving him paid leave due to the setting up of an in-house union and due to the union's trade dispute with the respondent in relation to the demand of 80 months performance bonus to be paid to clerical and non-clerical staff and due to union busting (see para 32).

(4) As the reason for applying for paid leave has been contractually agreed to be for industrial matters concerning the employer, it was perfectly proper after allowing for reasonable notice, for the employer to insist on compliance with the contractual requirement under Article 7(1). The question of having acted mala fide did not arise when parties had already agreed on the pre-condition to be fulfilled before paid leave needed to be given. The appellant had not proved mala fide on the part of the respondent (see para 35).

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(5) A reasonable notice period of one month would be sufficient to communicate to the appellant what was now a stricter interpretation and implementation of article 7(1) in that the appellant must now state if the reason for 'attending to trade union duties' is with respect to industrial matters of the respondent. In the circumstance it was fair for the appellant to be given his March pay of RM1,282.64 (being eight days' pay). The appeal against the unpaid leave for the months of April to September 2011 was dismissed (see paras 42–43).

[Bahasa Malaysia summary

Perayu merupakan Bendahari Kehormat Kesatuan Kebangsaan Pekerja Bank ('KKPB') untuk Cawangan Ipoh. Dia juga merupakan pekerja kepada responden, telah bekerja sebagai seorang kerani untuk bank responden selama 30 tahun. Di bawah skim perlindungan dan promosi kesatuan sekerja, kedua-duanya di bawah Akta Perhubungan Perusahaan 1967 ('APP'), Akta Pekerjaan 1955 dan perjanjian kolektif di antara KKPB dan Persatuan Bank Perdagangan Tanah Melayu ('PBPTM'), perayu terbiasa dengan memohon cuti berbayar untuk menghadiri aktiviti-aktiviti kesatuan sekerjanya. Tiada soalan ditanya mengenai sama ada cuti tersebut dikehendaki untuk menghadiri aktiviti-aktiviti kesatuan sekerjanya berhubung perkara industri berkenaan majikannya. Begitu juga, dia tidak perlu menyatakan secara khusus aktiviti-aktiviti kesatuan sekerja yang perlu dihadirinya. Itulah kedudukan daripada tahun 2005 hingga Februari 2011. Walau bagaimanapun, apabila perayu memohon pada Mac 2011 untuk cuti berbayar biasa atas alasan dia perlu menjalankan tugasan kesatuan sekerjanya, responden enggan untuk membenarkan cuti tersebut atas alasan bahawa perayu gagal untuk menyatakan alasan untuk cuti kesatuan sekerja tersebut. Perhatiannya diarahkan kepada artikel 7(1) memorandum perjanjian antara KKPB dan PBPTM ('artikel 7(1)') yang menyatakan bahawa cuti berbayar yang dipohon mestilah untuk menghadiri perkara industri berkenaan majikannya. Responden bagaimanapun membenarkan perayu cuti tidak berbayar. Perayu mengalami kerugian RM3,993.87 di antara Mac 2011 hingga September 2011 untuk bilangan hari cuti tidak berbayar yang diambil. Jumlah tersebut ditolak daripada gajinya. Perayu membuat satu tuntutan di Mahkamah Buruh untuk jumlah tersebut dan mendakwa bahawa gajinya telah ditolak secara salah di sisi undang-undang. Mahkamah Buruh menolak tuntutannya dan oleh itu rayuan ini dibuat. Perayu menghujahkan bahawa dia mempunyai jangkaan sah untuk terus-terusan menerima cuti berbayar untuk menjalankan kewajipan kesatuan sekerjanya dan bahawa responden telah bertindak secara mala fide apabila dia enggan memberikan cuti berbayar kesatuan sekerja.

Diputuskan, membenarkan sebahagian rayuan tanpa perintah terhadap kos:

(1) Responden telah memberikan notis dengan balasannya bertarikh 15 Mac 2011 mengenai tujuannya untuk mematuhi keperluan artikel 7(1)

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cuti berbayar berkenaan. Ini merupakan komunikasi oleh responden kepada perayu mengenai alasan rasionalnya untuk menarik semula apa yang telah diberikan tanpa sebarang pertanyaan dibangkitkan. Perayu mempunyai semua peluang untuk membalas tetapi tiada apa yang dilakukan. Sebaliknya, perayu melalui KKPB berterusan memohon cuti kesatuan sekerja selepas makluman 15 Mac 2011 dalam format standard yang sama seperti sebelumnya tanpa menyatakan alasan untuk cuti tersebut selain daripada 'untuk aktiviti kesatuan sekerjanya'. Oleh itu, perayu tidak boleh bergantung ke atas jangkaan sah apabila terdapat terma jelas dalam artikel 7(1) yang dipersetujui pihak-pihak. Apabila terdapat terma tersurat, perayu tidak boleh bergantung kepada jangkaan sah untuk menyimpang daripada atau membuang terma tersebut (lihat perenggan 22–23).

(2) Artikel 7(1) merupakan penghasilan semula perlindungan statutori di bawah s 6 APP, diberikan kepada kedua-dua pekerja yang bertujuan menjalankan kewajipannya atau untuk melaksanakan haknya sebagai seorang pegawai kesatuan sekerja begitu juga dengan majikannya. Walaupun sekiranya tiada artikel 7(1), s 6 APP akan terpakai memandangkan ianya satu peruntukan statutori yang digubal oleh Parlimen melainkan pihak-pihak bersetuju untuk terma yang lebih baik berhubung pekerja. Secara umumnya tiada estopel apabila ianya berkenaan statut (lihat perenggan 25–26).

(3) Perayu tidak mengemukakan apa-apa keterangan untuk membuktikan dakwaannya bahawa responden telah berhenti memberikannya cuti berbayar berikutan penubuhan kesatuan dalaman dan disebabkan pertikaian kesatuan sekerja dengan responden berhubung tuntutan 80 bulan bonus prestasi untuk dibayar kepada staf perkeranian dan bukan perkeranian dan disebabkan 'union busting' (lihat perenggan 32).

(4) Memandangkan alasan untuk memohon cuti berbayar telah dipersetujui secara kontrak untuk menjadi perkara industri berkenaan majikan, adalah lebih sesuai selepas membenarkan notis yang munasabah untuk majikan menegaskan untuk pematuhan dengan keperluan kontrak di bawah artikel 7(1). Persoalan bertindak secara mala fide tidak timbul apabila pihak-pihak telah bersetuju atas pra-syarat yang perlu dipenuhi sebelum cuti berbayar diberikan. Perayu tidak membuktikan mala fide bagi pihak responden (lihat perenggan 35).

(5) Satu notis munasabah selama satu bulan sudah mencukupi untuk menyampaikan kepada perayu apa yang kini menjadi tafsiran yang lebih ketat dan pelaksanaan artikel 7(1) bahawa perayu kini perlu menyatakan sekiranya alasan untuk 'menjalankan kewajipan kesatuan sekerja' adalah berhubung perkara industri mengenai responden. Dalam keadaan ini adalah adil untuk perayu diberikan gaji Mac sebanyak RM1,282.64 (iaitu gaji lapan hari). Rayuan terhadap gaji tidak berbayar untuk bulan

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April hingga September 2011 ditolak (lihat perenggan 42–43).]

Notes

For cases on contract on employment, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1006–1037.

Cases referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)
JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134, SC (distd)
Jamin Trading Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd [2011] 4 MLJ 662, HC (refd)
Kamarudin Merican (suing for himself and on behalf of all the members of the Association of West Malaysian Race Horse Trainers) v Kaka Singh Dhaliwal (sued as the public officer of the Malayan Racing Association) [2011] 7 MLJ 281, HC (folld)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 MLJ 49, PC (refd)
Law Pang Ching & Ors v Tawau Municipal Council [2009] 3 MLJ 452, CA (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149, CA (refd)
Sim Yong Kim v Evenstar Investments Pte Ltd [2006] 3 SLR 827, CA (refd)
Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)
United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b, HC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Employment Act 1955 s 69
Industrial Relations Act 1967 s 6

Pushpa Ratnam (Susielan & Assoc) for the appellant.
A Ramadass (Ramadass & Assoc) for the respondent.

Lee Swee Seng J:

[1] The appellant is a trade union leader. He is the honorary treasurer of the National Union of Banking Employees ('NUBE') for its Ipoh Branch. He is also an employee of the respondent. He has been working as a clerk for the respondent bank for 30 years. Under the scheme of trade union protection and promotion, both under the Industrial Relations Act 1967, the Employment Act 1955 and the relevant collective agreement between NUBE and Malayan

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Commercial Banks' Association ('MCBA'), the appellant was accustomed to applying for paid leave to attend to his trade union activities. No question was asked as to whether the leave was required to attend to his trade union activities in relation to industrial matters concerning his employer. Neither was he required to set-out the specific activities of the trade union that he had to attend. That had been the position from 2005 to February 2011.

PROBLEM

[2] However, when the appellant applied on 2 March 2011 for his usual paid leave on ground of his need to carry out his trade union duties, the respondent replied to state that it was not in a position to grant the appellant paid trade union leave. The respondent bank stated that the application for trade union leave did not comply with the express provision of the collection agreement, in that, the appellant had failed to state the reasons for such a trade union leave. His attention was drawn to article 7(1) of the memorandum of agreement between NUBE and the MCBA. The respondent pointed out to the appellant that he had not complied with the requirement that the leave applied for must be stated to be for attending to industrial matters concerning his employer as required under article 7(1) before paid leave may be granted.

[3] Be that as it may, the appellant was granted, as a measure of goodwill, unpaid leave. That was communicated to him by an e-mail notice of 15 March 2011.

[4] The appellant felt aggrieved by the decision of his employer. Translated into monetary terms, he suffered a loss of RM3,993.87 between March 2011 to September 2011 for the number of days of unpaid leave taken. That amount had been deducted from his salaries. He brought his claim in the Labour Court for the above amount that was not paid to him. He claimed that his salaries had been unlawfully deducted. The complaint was made under s 69 of the Employment Act 1955 where the Director General of Labour may inquire into and decide any dispute between an employee and his employer in respect of wages under (a) any term of the contract of service between such employee and his employer.

[5] The Labour Court dismissed his claim on 15 January 2013. The Labour Court was of the view that the employer was well within its legal rights as provided for under article 7(1) of the memorandum of agreement as contractually the appellant could only be entitled to paid leave if in the leave application to the employer, it had been disclosed the reasons for the trade union leave in that it was in relation to industrial matters concerning his employer.

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[6] Dissatisfied with such a decision the complainant had appealed to this court.

PRAYERS

[7] The appellant's main grounds of appeal are as follows:

(a) that the appellant has a legitimate expectation to continue receiving paid leave to carry out his trade union duties (see para 1 of the appellant's memorandum of appeal);

(b) the respondent acted mala fide when it had refused to grant the appellant paid trade union leave (see para 4 of the appellant's memorandum of appeal); and

(c) the Assistant Director of Labour had erred on law and in fact by taking into consideration irrelevant factors and failing to take into consideration relevant factors (see paras 3–4 of the appellant's memorandum of appeal).

PRINCIPLES

Whether the appellant, having been given paid leave for his union activities since 2005 until February 2011, may raise legitimate expectation in his claim for unpaid salary arising out of unpaid leave granted from March 2011

[8] The concept of legitimate expectation has its origin in the field of public law. The concept can be traced back to the case of *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 and this concept reached our shore in the Supreme Court's decision in *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134. His Lordship Abdoolcader SCJ quoted from the case of *Schmidt* as follows at p 135:

> The Court of Appeal in England held in *Schmidt and Another v Secretary of State for Home Affairs* [1969] 2 Ch 149 that no duty existed to give an alien an opportunity of being heard before a decision was made refusing an application for an extension of permission to remain in the United Kingdom. Lord Denning MR emphasised that the alien had 'no right' and 'no legitimate expectation' of being allowed to stay. However, he also said that the alien had not been treated unfairly since he had had an opportunity of making representations. Lord Denning describes (at p 170) an administrative body as being bound, in proper cases, to give a person affected by its decision an opportunity of making representations if, although lacking any right or interest, that person yet possesses 'some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.' By way of illustration he contrasts the case of an alien whose residence permit has expired with that of another whose permit is revoked before its expiry date; the latter possesses a legitimate expectation of being allowed to stay for the full term of the permit, and he alone has, in consequence, a legal right, in accordance with the principles of

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natural justice, to insist that his representations be considered before the making of any decision upon his deportation.

[9] Further at p 136 His Lordship quoted from the Privy Council case from Hong Kong as follows:

> The doctrine of legitimate expectation has recently been lucidly expounded and explained by the Privy Council in *Attorney-General* of *Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 and Lord Fraser of Tullybelton in delivering the judgment of the board said (at p636):
>
> > Accordingly '*legitimate expectations*' *in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis*: see *Reg v Criminal Injuries Compensation Board Ex parte Lain* [1967] 2 QB 864 So it was held in *Reg v Board of Visitors of Hull Prison Ex parte St Germain (No 2)* [1979] 1 WLR 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.
>
> (Emphasis added.)

[10] In *Law Pang Ching & Ors v Tawau Municipal Council* [2009] 3 MLJ 452, the Court of Appeal, speaking through Abu Samah JCA (now FCJ) endorsed the concept of legitimate expectation though denying the appellant of the relief of certiorari by majority with Gopal Sri Ram JCA (as he then was) dissenting. His Lordship Abu Samah JCA observed as follows at pp 469–471:

> [41] Since then (referring to *Schmidt*'s case), the doctrine of legitimate expectation had been applied in many different circumstances. In *R v Brent LBC*; *ex parte Mac Donagh* [1990] COD 3; 21 HLR 494, gypsies had a legitimate expectation that a council would not evict them without finding them an alternative site. In *R v Enfield LBC*; *ex parte TF Unwin (Roydon) Ltd* [1989] 1 Admin LR 51, contractors had a legitimate expectation that they would not be removed from the list without a hearing. In *R v Liverpool Corporation*; *ex parte Liverpool Taxi Fleet Operators Association* [1972] 2 QB 229, it was held that the corporation's decision to increase the number of taxi licenses without consulting the operator's association was unfair because the decision was in breach of an assurance to the contrary.
>
> [42] In *Attorney General* of *Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, the applicant who was born in China entered Hong Kong illegally from Macau in 1967. By 1980, he was the part time owner of a small factory. In October, the same year, the government announced changes in its immigration policy and that each illegal entrant from Macau would be interviewed and his case 'treated on its merit's'. After being questioned and detained, the Director of Immigration made a removal order against him without giving him an opportunity of making any representations as to why he should not be removed. The applicant applied to the High Court for orders of certiorari to quash the removal order and prohibition restraining the director from executing it. The High Court refused his application. On appeal, the Court of

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Appeal granted an order of prohibition preventing the director from executing the removal order until he had given the applicant an opportunity to be heard.

...

[44] Lord Diplock in *Council of Civil Service Unions & Ors v Minister for Civil Service* [1985] AC 374 at pp 408–409 held that for a legitimate expectation to arise the decision must affect the other person: by depriving him of some benefit or advantage which either (i) *he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment;* or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (Emphasis added.)

[11] See also the Federal Court case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1.

[12] The application of the concept of 'legitimate expectation' has been extended to a limited number of private law cases. In *Jamin Trading Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd* [2011] 4 MLJ 662, Vernon Ong J had referred to cases where public law remedy had been applied in matters of private law. His Lordship observed at p 678 as follows:

[37] The historical background relating to the doctrine of legitimate expectation has been clearly set out by the Court of Appeal in *Law Pang Ching & Ors v Tawau Municipal Council* [2009] 3 MLJ 452; [2010] 2 CLJ 821, at pp 467–469 (MLJ); at pp 836–838 (CLJ). Suffice to say that as a general rule the doctrine is an equitable doctrine under development in public law. Is the doctrine applicable to a private law situation? Recognition of this doctrine appears to have been accorded in private law situation within the context of shareholder's rights in a private company involving elements of quasi partnership, other personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience if the former.

[13] His Lordship then referred to the Court of Appeal case of *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 and the Singapore Court of Appeal case of *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827. His Lorship then concluded at p 679 as follows:

As can be seen from the cases cited by the plaintiff the doctrine of legitimate expectation may arise in situations other than in the realm of public law. However, the cases are distinguishable as they relate particularly to the question of a shareholder's rights in a private company *and not to a party's rights under a private contract situation*. In the premises the cases are of no aid to the plaintiff's contention. There is therefore no basis upon which the plaintiffs can lay to a legitimate

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A expectation that the defendant will renew the operation of the petrol station so long as the PDA license is renewed by the first plaintiff ... (Emphasis added.)

[14] In *Kamarudin Merican (suing for himself and on behalf of all the members of the Association of West Malaysian Race Horse Trainers) v Kaka Singh Dhaliwal (sued as the public officer of the Malayan Racing Association)* [2011] 7 MLJ 281, I had opined that the concept of legitimate expectation may be applicable to private law matters in cases where the private arrangement and agreement of the parties are infused with a public element especially in cases of unfair discrimination and unconscionable and unreasonable conduct with constitutional overtone. At pp 298–299 I had stated as follows:

> [47] ... 'Legitimate expectation' is what the word suggests: an expectation that one legitimately look forward to and though as a concept it started in the realm of public law it has an equivalent though *reverse concept in private law as in the concept of estoppel where a party because of his action or inaction in a contractual relationship context is estopped from raising certain defenses for instance*.
>
> [48] I think the public private law dichotomy can be a little artificial as concepts of unconscionability, reasonableness and fairness are universal concepts of law that pervade the whole corpus juris as may be applied to every sphere and spectrum of human endeavour and experience. More so, *when a private contractual relationship has a public element infused into it* as in this case of the livelihood of race horse training and all that its entails with big money changing hands. (Emphasis added.)

[15] Learned counsel for the appellant, Miss Pushpa Ratnam, had summarised the propositions of the doctrine of 'legitimate expectation' as follows:

(a) they include expectations which go beyond enforceable legal rights, provided they have some reasonable basis;

(b) the expectations may be based upon some statement or undertaking made by the decision making authority;

(c) the decision making authority had made a decision which had abruptly deprived the recipient continued enjoyment, which the recipient had legitimately expected to be permitted to enjoy;

(d) there was no communication of any rational grounds for withdrawing the benefits enjoyed, on which the recipient was allowed to comment; and

(e) the recipient unfairly by denying the recipient the right to be heard.

[16] Applying the above propositions to the present factual scenario, Miss Pushpa argued as follows:

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(a) the appellant had been enjoying paid trade union leave for about six years ie from 2005–2011;

(b) the appellant had every reason to continue expecting to be given trade union leave further in the future;

(c) this expectation was based on the fact that the respondent had not once before 2 March 2011 questioned the paid leave given to the appellant for trade union duties;

(d) suddenly on 2 March 2011, this benefit which the appellant was enjoying was stopped and there was no reason communicated to the appellant by the respondent or any opportunity given to the appellant to be heard;

(e) it was an abrupt decision by the respondent depriving the appellant of his legitimate expectation;

(f) the abrupt decision was due to the fact that the respondent wanted to react to the NUBE's resistance to its support to the in-house union. The respondent willfully did not support the appellant's trade union duties because it is now in conflict with its own support for the in-house union; and

(g) the fact that the respondent had failed to give trade union leave was due to the respondent's support for the in-house union was a relevant fact not considered by the Labour Court.

[17] To set the record straight, the relevant mails between the parties must be referred to. NUBE wrote on behalf of the appellant in the usual way it had written for umpteen times in the past seeking paid leave for the appellant for the requisite dates to 'enable him to attend to his trade union activities.' The said letter of 1 March 2011 at p 53 of the supplemental appeal record is reproduced below:

> 1st March 2011
>
> Branch Manager
>
> Maybank Berhad 8,
>
> Tranchell Street 31450
>
> Menglembu
>
> Dear Sir/Madam
>
> TRADE UNION LEAVE FROM 2nd MARCH 2011 TO 4th MARCH 2011
>
> We wish to inform you that Mr. Narenthra Rao an employee of your organization and a member of the National Executive Council of NUBE is required to carry out his trade union duties.

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> We would therefore be grateful if you could kindly grant him paid leave from *Wednesday, 2nd March 2011 to Friday, 4th March 2011* to enable him to attend to same.
>
> We very much appreciate your cooperation in this matter.
>
> Thank you.
>
> Yours faithfully
>
> Sgd
>
> J SOLOMON
>
> GENERAL SECRETARY
>
> Cc Mr. Narenthra Rao
>
> Manager, Human Resources Division
>
> Maybank Bhd - Head Office
>
> Hon. Secretary, NUBE Ipoh Branch
>
> President
>
> Hon. Treasurer

[18] The respondent bank replied the same day via e-mail to say that the appellant had been granted the five days of trade union leave to attend to his trade union activities (p 52 of the supplemental appeal record). It added: 'However, it will be on a *No Pay* basis.' Thus it was unlike previous occasions when the leave granted was paid leave. NUBE must have written in for an explanation and the bank replied as follows in its letter of 15 March 2011 (p 51 of the supplemental appeal record):

> Dear Mr. Chen and Mr. Rao,
>
> Our email confirming your trade union leave dated 1.3.2011 and your reply dated 2.3.2011 refers.
>
> 2. Please be informed that in Article 7 of the Memorandum of Agreement between NUBE and MCBA dated 10.8.2010 expressly stipulates that an employees must apply, to the Bank, in writing, stating the duration of and the purpose for which leave is applied for. Upon receipt of such application, the Bank shall grant the application for leave if the duration of the leave applied for is no longer than what is reasonable for the indicated purpose.
>
> 3. However, the Bank notes that your application for trade union leave does not comply with the express provisions of the collective agreement, in that, you have failed to state the reasons for such trade union leave. Your application merely states that the application is for 'attending to trade union duties'. As you have failed to comply with the express provisions of the Collective Agreement, the Bank is not in the position to grant you paid trade union leave.

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4. Despite your failure to state the specific trade union duties that you require a leave of absence for, the Bank has, as a measure of goodwill, granted such leave. This trade union leave shall, however, be on a no pay basis.

5. We trust the above clarifies.

Yours faithfully,

Hisham

Industrial Relations, GHC

[19] The relevant article 7 of the memorandum of agreement between NUBE and MCBA dated 10 August 2010 at p 123 of the supplemental record of appeal is set out below:

ARTICLE 7 — LEAVE ON TRADE UNION BUSINESS

(1) An employee intending to carry out his duties or to exercise his right as an officer of a trade union shall apply in writing to the Bank for leave of absence stating the duration of and *the purposes for which such leave is applied for* and the Bank shall grant the application for leave if the duration of the leave applied for is for a period that is no longer than what is reasonably required for the purposes stated in the application:

PROVIDED THAT *an employee shall not be entitled to leave with pay for the duration of his absence if the purposes for which he is absent from work are not to represent the members of his trade union in relation to industrial matters concerning his employer.*

(2) The Bank may grant to its employees leave with full pay to attend trade union courses or conferences provided that:

(a) such leave shall not exceed six months in the case of a trade union course or one week in the case of a trade union conference;

(b) the number of employees attending such a course or conference shall not be more than one (1) from each Head Office Department or not more than one (1) from each Bank Branch, subject to a maximum of four (4) from each Bank; and

(c) application for such leave should be supported by a letter from the Union Head Office. (Emphasis added.)

[20] As can be seen the respondent bank gave its reason why the leave approved was a no pay leave. It cited the requirement that had always been there in article 7(1) though in the past it had rather been laxed when the need to state the reasons was concerned. The paid leave sought must be to attend to industrial matters concerning its employer ie the respondent bank. Here is a case where the respondent is asking for the contractual requirements to be complied with. The appellant of course would have every opportunity to reply to the response from the bank with respect to his reasons why he should

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nevertheless be granted paid leave. However there was no further letter from the appellant on this issue. There were subsequent standard form applications for paid leave for the months following until September 2011 and the response from the bank was that of a no pay leave.

[21] The situation we have here falls neatly into the exception envisaged by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p 408 where he held that for a legitimate expectation to arise the decision must affect the other person:

> by depriving him of some benefit or advantage which either (i) *he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; …* (Emphasis added.)

[22] Granted, in the past from 2005 to February 2011, the respondent had been allowing and approving paid leave to the appellant on a mere expression of the need to attend to 'his trade union activities'. There was then no need to state anything further or to bring it within the meaning of 'industrial matters concerning his employer'. However, the respondent had given notice by its response dated 15 March 2011 as to its intention of abiding by the requirements of article 7(1) where paid leave is concerned. This is a communication by the respondent to the appellant of its rational ground for withdrawing what had hitherto been granted without any question raised. The appellant had every opportunity to reply but there was none exhibited. Instead, the appellant through NUBE continued to apply for trade unions leave after the notification of 15 March 2011 in the same standard format as before without stating the reasons for the leave other than 'for his trade union activities'. This continued until October 2011 when the appellant filed his complaint with the Labour Office.

[23] I agree with Mr A Ramadass, learned counsel for the respondent, that the appellant cannot in this case rely on legitimate expectation when there is a clear term in article 7(1) that the parties had agreed on. Where there is an express contractual term, the appellant cannot rely on legitimate expectation to depart from or denude the term of meaning altogether. Miss Puspha's reliance on *JP Berthelsen*'s case can be distinguished in that there a foreigner was given an employment pass for a period of two years whereby the employment pass was cancelled before the expiry of the two years. The Supreme Court held that the foreigner had a legitimate expectation to be allowed to stay for the full term of two years and to be given an opportunity to be heard before the making of any decision before his deportation.

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[24] I do not think the respondent can be faulted for insisting on the strict contractual term in article 7(1). However as there has been a shift from the position previously taken by the bank, I think a reasonable notice of one month should be given in the circumstances of the case. I would thus hold that the appellant is entitled to his paid leave for March 2011 and that the no pay leave should only be enforced from April 2011 onwards.

[25] Article 7(1) of the memorandum of agreement is a reproduction of the statutory protection in s 6 of the Industrial Relations Act 1967 ('the IRA'), given to both the workman intending to carry out his duties or to exercise his rights as an officer of a trade union as well as his employer. It reads:

> 6 Leave on trade union business
>
> A workman intending to carry out his duties or to exercise his rights as an officer of a trade union shall apply in writing to his employer for leave of absence stating the duration of and *the purposes for which such leave is applied for* and the employer shall grant the application for leave if the duration of the leave applied for is for a period that is no longer than what is reasonably required for the purposes stated in the application:
>
> Provided that *a workman shall not be entitled to leave with pay for the duration of his absence if the purposes for which he is absent from work are not to represent the members of his trade union in relation to industrial matters concerning his employer*. (Emphasis added.)

[26] It may fairly be argued that even if there had been no article 7(1), s 6 of the IRA would apply as it is a statutory provision enacted by Parliament unless the parties agree to a more favourable term with respect to the workman. Generally there can be no estoppel where statute is concerned. In *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b Edgar Joseph Jr J (as he then was) at p 356 held:

> The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute.

[27] In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49 Viscount Radcliffe, Privy Council, at p 54 stated:

> ... a party cannot set up estoppels in the face of a statute ...

If estoppel cannot apply in the field of private law, then correspondingly legitimate expectation would not apply even if one were to infuse this private law dispute with a public law element.

[28] In any event there is no public law element here as the claim by the appellant in the Labour Court is for unpaid salaries arising from what the appellant said should be paid to him because the respondent bank should have

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granted him paid leave instead of no pay leave. In other words it is a claim for unlawful deduction from his salary for the trade union leave taken in the months of March 2011 to September 2011 amounting to RM3,993.87. It is purely an interpretation of article 7(1) of the memorandum of agreement which is a contractual reproduction of a statutory provision in s 6 of the IRA.

Whether the refusal to grant paid leave to the appellant was made 'mala fide' in the circumstances of the case

[29] Miss Pushpa Ratnam contended that the decision not to grant paid leave was made mala fide. Her argument run like this:

(1) the respondent had recently recognised the formation of an in-house union known as MAYNEU;

(2) NUBE, being the national union, is against the formation of this in-house union on the basis that it is an attempt to weaken the national trade union;

(3) MAYNUE was officially registered as an in-house union on 3 January 2011. NUBE had been actively criticising the in-house union;

(4) when the appellant then applied for leave to carry out trade union duties for NUBE, the respondent *reacted* — by granting unpaid leave *and not* paid leave — a departure from a practice that had been carried out for six years. This is the mala fide act on the part of the respondent;

(5) this fact ie that the respondent had reacted in such a manner due to the resistance of NUBE to MAYNEU was put in evidence by the appellant in his examination-in-chief, (see p 34 in the supplemental appeal record Q 17); and

(6) the appellant was not cross-examined on this at all. The failure to cross-examine the appellant on this crucial piece of evidence is deemed admission. This is expressly stated to be the law, by the then, Federal Court, in the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at 213 para D–F, the exception to this principle is where:

(a) the story is of an incredible or romancing character;

(b) the abstention (abstaining from cross-examination) arises from mere motives of delicacy; and

(c) the abstention is to save time,

(7) that the exceptions to the general principle of law established in *Wong Swee Chin*, does not apply here; and

(8) in fact, when the appellant's solicitor attempted to cross-examine the respondent's witness Mohd Hisham bin Zamhuri — the industrial

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relations officer of Maybank on this issue, counsel for the respondent had objected and the Labour Court had wrongly accepted this objection.

[30] Mr A Ramadass, learned counsel for the respondent, pointed out that contention No 8 above appears no where in the notes of evidence and thus should be disregarded by this court. Appealing as the arguments of the Miss Pushpa are, where a party is relying on its contractual rights, which rights in this case has a statutory underpinning, the question of bad motive or mala fide does not arise.

[31] Learned counsel for the respondent, Mr A Ramadass, pointed out that under cross-examination, the appellant admitted that he did not attend to industrial matter or labour matter concerning the respondent during the trade union leave applied for. As highlighted by Mr Ramadass, the Labour Court did take into consideration the fact that the respondent did grant paid leave on the days that the appellant gave his reasons falling within article 7(1) with respect to attending to industrial matters concerning the employer. One such incident was on 23 June 2011 when the reason stated was to 'attend the 49th National Executive Council Meeting' (p 67 of the supplemental appeal record). Therefore the appellant's contention that he was never given paid leave for trade union leave taken after February 2011 is not quite true.

[32] I agree with Mr A Ramadass that the appellant had not adduced any evidence to prove his allegation that the respondent had stopped giving him paid leave due to the setting up of an in-house union and due to the union's trade dispute with the respondent in relation to the demand of 80 months performance bonus to be paid to clerical and non-clerical staff and due to union busting. As a matter of fact the respondent did cross-examine the appellant on this point of the formation of an in-house union as the reason why the respondent was not granting paid leave to the appellant. Thus it cannot be said that a failure to cross-examine the appellant is deemed admission that the reason for not approving paid leave is because of the formation of an in-house union. The relevant part of the cross-examination of the appellant appears at p 11 of the supplemental appeal record as follows:

Q: Setting up in house union is not the reason they did not pay leave?

A: Disagree.

[33] The Labour Court asked the respondent's witness, Encik Mohd Hisham bin Zamhuri, an industrial relations officer of the respondent, the following question (p 23 of the supplemental appeal record):

Q: On what basis the bank grant paid trade union leave before 2011?

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A: Before 2011 the bank and the union has no dispute. After that there are some abuses. If they did not state the reason for trade union leave the bank will not grant paid leave.

[34] There is thus a rational basis for insisting now on the need to state and spell out the reasons for the trade union leave in line with and in compliance with the requirements of article 7(1) which is a contractual incorporation into the memorandum of agreement the statutory enunciation in s 6 of the IRA.

[35] I would hold that as the reason for applying for paid leave has been contractually agreed to be for industrial matters concerning the employer, it was perfectly proper after allowing for reasonable notice, for the employer to insist on compliance with the contractual requirement under article 7(1) of the memorandum of agreement. The question of having acted mala fide does not arise when parties have already agreed on the pre-condition to be fulfilled before paid leave needs to be given. At any rate, the appellant had not proved mala fide on the part of the respondent.

Whether the labour court has taken into consideration irrelevant factors and failed to consider relevant factors

[36] Learned counsel Miss Pushpa faulted the Labour Court when it held at p 32 of the supplemental appeal record the following:

The court is unsure if the leave was for trade union duties in relation to industrial matters.

[37] She mounted the argument that in the grounds of judgment, the Labour Court had taken into account an irrelevant factor ie 'Mahkamah tertanya-tanya sama ada Pengadu menghadiri tugas kesatuan atas industrial matters atau tidak yang mana tidak dibuktikan oleh pengadu di mahkamah'. She submitted that it was not part of the respondent's case at the Labour Court that the appellant had not taken part in trade union work. The respondent had sought to apply article 7(1) of the collective agreement strictly in that the trade union leave must be to represent the members of the appellant's trade union in relation to industrial matters concerning his employer. She concluded that the Labour Court had arrived at its decision that it is unsure if the appellant was involved in trade union work, at all. This, Miss Pushpa submitted, is an irrelevant consideration.

[38] With respect the decision of the Labour Court must be taken in its proper context. The proper context is set out at p 28 of the supplemental appeal record as follows in its summary of the respondent's case:

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> Hak untuk memohon cuti kesatuan diperuntukkan di dalam Art.7(1) ... Pihak bank akan meluluskan cuti kesatuan bergaji sekiranya tujuan-tujuan kehadiran untuk mewakili kesatuan sekerja yang bersabit dengan perkara-perkara perusahaan mengenai majikan.
>
> Defendan tidak meluluskan cuti bergaji untuk PM sejak 14.3.2011 kerana surat-surat dari NUBE cuma menyatakan bahawa PM 'is required to carry out his trade union duties'.

[39] Reading the whole judgment in its context the Labour Court was unsure as no evidence was led that the trade union leave applied for by the appellant was with respect to industrial matters concerning the respondent. Miss Pushpa also submitted that the Labour Court had held that the appellant was negligent in that the appellant had not give reasons for the leave application. She submitted that in the past six years, the respondent had not asked any reasons when the appellant had applied for leave for trade union duties.

[40] Understood in its proper context, what the Labour Court had found was that after the notice of 15 March 2011, the appellant negligently persisted in merely stating what he had always stated in the past through NUBE that it was to 'carry out his trade union duties'. This can be seen at p 32 of the supplemental appeal record as follows:

> PM telah sedia maklum syarat-syarat atau kriteria yang diperlukan pihak Defendan bagi meluluskan cuti kesatuan bergaji. Emel bertarikh 15/3/2011 (Ikatan Dokumen Surat (4.) Namun PM masih gagal membuat perincian dalam permohonan terdahulu dan permohonan cuti seterusnya ...

[41] Taken in its proper context, I cannot see how it could justifiably be said that the Labour Court had taken into consideration irrelevant factors or that it had failed to take into consideration relevant factors.

PRONOUNCEMENT

[42] As stated above, given the respondent's own interpretation of article 7(1) in the past and the implementation of it through the years from 2005 to February 2011, I would hold that a reasonable notice period of one month would be sufficient to communicate to the appellant what is now a stricter interpretation and implementation of article 7(1) in that the appellant must now state if the reason for 'attending to trade union duties' is with respect to industrial matters of the respondent. The right of the respondent has always been there for it to enforce. It is further undergirded by the statutory enunciation in s 6 of the IRA.

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[43] In the circumstance it would be fair, just and reasonable for the appellant to be given his March pay of RM1,282.64 (being eight days' pay) less RM127 being his EPF contribution which gives a sum of RM1,155.64 and so the appeal was allowed to that extent only. The appeal against the unpaid leave for the months of April to September 2011 was dismissed. I had exercised my discretion to make no order as to costs.

Appeal allowed in part with no order as to costs.

Reported by Kanesh Sundrum